SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 14, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14479-
14480 Index 116747/10

Marcia Meyers,
Plaintiff-Respondent,

-against-

Four Thirty Realty,
Defendant-Appellant.

_____

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellant.

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 15, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion to renew, and upon renewal, vacated those parts of a prior order, same court and Justice, entered June 25, 2012, which dismissed plaintiff's claim for treble damages and set the base date rent for plaintiff's rent-stabilized lease at $3,700 per month, plus permissible annual increases, unanimously affirmed, without costs. Order, same court and Justice, entered June 25, 2012,

which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing plaintiff's overcharge causes of action as barred by the statute of limitations, unanimously affirmed, without costs.

Plaintiff tenant brought this action alleging that defendant landlord improperly and fraudulently removed the subject apartment from rent stabilization. Defendant registered the apartment with the Division of Housing and Community Renewal (DHCR) as permanently exempt from rent stabilization due to high rent vacancy deregulation, and did so at a time the building was receiving J-51 tax benefits. Plaintiff seeks, among other things, a declaration that the apartment is rent-stabilized, an injunction directing that she be given a rent-stabilized lease with the proper lawful rent, treble damages for overcharges, and attorneys' fees. As defendant concedes, plaintiff is entitled to a rent-stabilized lease because the building was receiving J-51 tax benefits at the time the apartment was deregulated (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 198 [1st Dept 2011] [giving retroactive effect to *Roberts*]).

The motion court properly declined, at this early stage in the proceedings, to determine the base date rent (*see 72A Realty*

Assoc. v Lucas, 101 AD3d 401, 402 [1st Dept 2012]). As the motion court found, the DHCR rent history reveals that defendant had previously registered a rental increase from $648.58 to $2,175.22. Defendant contends that this increase was lawful because it reflected the agreed-upon lease rent after the apartment moved out of rent control and into rent stabilization (*see* Rent Stabilization Code [9 NYCRR] § 2521.1). However, the DHCR rent history also contains a notation that this change in rent was the result of, at least in part, unspecified improvements. Further, the record below contains neither the lease from the earlier period nor any other documents explaining the significant increase. Finally, plaintiff alleges that defendant fraudulently removed the unit from rent stabilization while receiving J-51 tax benefits and thereafter failed to file the required annual rent registrations with DHCR.

Under all these circumstances, a determination of the proper base date rent would be premature and must await further discovery "for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]; *see* CPLR 3212[f]). Likewise,

absent a fuller record on the fraud issue, it cannot be determined whether plaintiff's overcharge claims are barred by the statute of limitations and whether any such overcharge was willful, entitling plaintiff to treble damages (*see Conason v Megan Holding, LLC*, __ NY3d__, 2015 NY Slip Op 01553 [2015]; *72A Realty Assoc.*, 101 AD3d at 402-403).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Tom, J.P., Renwick, DeGrasse, Gische, Clark, JJ.

13454 HSBC USA, etc., Index 381904/09
Plaintiff-Respondent,

-against-

Betty Lugo,
Defendant-Appellant,

New Century Mortgage Corp., et al.,
Defendants.

_____

Law Offices of Robert M. Brill, LLC, New York (Robert M. Brill and Anita Jaskot of counsel), for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Geraldine A. Cheverko of counsel), for respondent.

_____

Amended order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 17, 2012, which, in this mortgage foreclosure action, denied defendant mortgagor's motion to dismiss the complaint, or, in the alternative, to compel plaintiff to accept her untimely answer, modified, on the law and the facts, to grant the motion to compel plaintiff to accept defendant's untimely answer, and otherwise affirmed, without costs.

This action seeks foreclosure on a $271,360 mortgage made on May 9, 2006, between New Century Corporation (New Century), as lender, and defendant Betty Lugo, as borrower, which was secured

by real property located in the Bronx and a note. New Century purportedly assigned the mortgage to plaintiff HSBC Bank USA.

The motion court properly denied defendant's motion to dismiss the complaint. Defendant waived her right to seek dismissal of the complaint as abandoned pursuant to CPLR 3215(c), because she did not object to plaintiff's treatment of her untimely answer as a notice of appearance and because she thereafter sought documents from plaintiff (*see Myers v Slutsky*, 139 AD2d 709 [2d Dept 1988]). Nor is defendant entitled to dismissal of the complaint based on plaintiff's alleged failure to comply with RPAPL 1304, given the lack of probative evidence concerning the applicability of that section.

However, in light of the strong public policy of this state to dispose of cases on their merits (*see Berardo v Guillet*, 86 AD3d 459, 459 [1st Dept 2011]; *Yu v Vantage Mgt. Servs., LLC*, 85 AD3d 564, 564 [1st Dept 2011]; *Billingly v Blagrove*, 84 AD3d 848, 849 [2d Dept 2011]), the motion court improvidently exercised its discretion in denying defendant's motion to compel acceptance of the untimely answer. The circumstances herein demonstrate that the delay was not willful (*see DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011]). Nor has plaintiff pointed to any evidence that the relatively short delay

involved here, which was undisputedly mostly attributable to ongoing settlement negotiations, caused it to change its position or to suffer any similar prejudice *(see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]; *Forastieri v Hasset*, 167 AD2d 125 [1st Dept 1990]). In fact, plaintiff has acknowledged that from September 2009 to June 22, 2011, it placed the foreclosure file on hold while the parties attempted to negotiate a settlement, including defendant's attempt to negotiate for a "short sale." A further hold was placed on the case by FEMA from September 11 through November 22, 2011. The Court accepted plaintiff's argument that its delay in prosecuting this case between 2009 and 2011 was attributable to ongoing settlement negotiations. These same negotiations likewise justify defendant's late answer. Moreover, a review of the record indicates that defendant also has an arguably meritorious affirmative defense of plaintiff's lack of standing to commence this foreclosure action (*see id.*). Serious issues exist regarding plaintiff's ownership of the mortgage and note given

the absence of such documents in the record and the fact that the assignment is undated. These issues are best resolved on the merits, as opposed to on default.

All concur except Tom, J.P. and DeGrasse, J. who dissent in part in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting in part)

This Court is in agreement that defendant waived her right to seek dismissal of the complaint as abandoned pursuant to CPLR 3215(c) and that she has not established the applicability of RPAPL 1304 so as to afford a basis for dismissal (RPAPL 1304[5][a][iii]). However, I find that the motion court properly denied defendant's motion to compel acceptance of the answer, given the absence of any excuse for the almost five-month delay in answering the complaint or the nearly two-year delay in making this motion (CPLR 3012[d]; *see Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 618 [1st Dept 2012] [no reasonable excuse for default provided]; *Mannino Dev., Inc. v Linares*, 117 AD3d 995 [2d Dept 2014] [absent a reasonable excuse for delay, extension of time to answer properly denied despite defendants' participation in required settlement conferences]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647 [2d Dept 2014] [same]; *compare Sackman Mtge. Corp. v 111 W. 95th St. Realty Corp.*, 152 AD2d 463, 464 [1st Dept 1989] [prompt answer upon learning that summons and complaint had been mailed to deceased attorney]).

It is within the exercise of a motion court's discretion to assess the sufficiency of a movant's submissions in support of relief pursuant to CPLR 3012(d) (*e.g. Provident Life & Cas. Ins.*

Co. v Hersko, 246 AD2d 365 [1st Dept 1998]), and on this record the finding that defendant failed to advance any excuse whatsoever for her failure to serve a timely answer can hardly be said to have been an abuse of discretion (*see Fidelity & Deposit Co. of Md. v Andersen & Co.*, 60 NY2d 693, 695 [1983]; *Mufalli v Ford Motor Co.*, 105 AD2d 642, 643 [1st Dept 1984]). Even on appeal, defendant supplies no excuse for the delay in answering.

To compel acceptance of defendant's answer, as urged by the majority, on the preference that cases be decided on the merits, results in the exception swallowing the rule. If reaching the merits is the paramount goal, a court need never consider the statutory prerequisites for the grant of relief from a default – namely, a reasonable excuse and the demonstration of the merit of the defense. It is a rare appellate case in which the rationale embraced by the majority has been applied in the context of a motion to compel acceptance of an answer (*see Harcztark v Drive Variety, Inc.*, 21 AD3d 876 [2d Dept 2005] [insurer's three-month delay in answering a complaint on behalf of its insured]), and no equitable consideration warrants acceptance of the answer in this matter (*cf. Smith v Daca Taxi*, 222 AD2d 209, 211 [1st Dept 1995] [attempted bribery of a witness]). To the contrary, defendant has benefitted from the delay by remaining in possession of the

foreclosed vacant premises, which she does not occupy as a principle residence, to the detriment of plaintiff. Defendant's delay of almost two years after the rejection of her answer before moving to compel its acceptance in this foreclosure action does not constitute a "short delay" as urged by the majority. There is no dispute that defendant defaulted in the mortgage payments. The record reflects that defendant owed a default balance of $268,817.47 as of August 31, 2009. In view of the loss of interest on the debt and the associated carrying costs, it also cannot be said that plaintiff will not continue to sustain prejudice as a result of further delay in recovering the property. Thus, this matter does not fulfill the criterion that the grant of relief will not result in prejudice to the opposing party (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 293 AD2d 324, 325 [1st Dept 2002]; *Elemery Corp. v 773 Assoc.*, 168 AD2d 246, 247 [1st Dept 1990]). The majority's statement that defendant's short delay was "undisputedly mostly attributable to ongoing settlement negotiations" is inaccurate and not supported by the record. Significantly, defendant's attorney, in his reply affidavit, avers that plaintiff's allegation of negotiation with defendant from September 2009 to June 22, 2011 is "unsubstantiated in any way by affidavit of

person with knowledge or [by] documentary evidence." Thus, defendant denies there were negotiations between the parties. Even if there were settlement discussions between the parties, such negotiations cannot extend the time to serve an answer to the foreclosure complaint (*HSBC Bank USA, N.A.*, 115 AD3d at 648).

Finally, some of the defenses proffered border on the frivolous. It should not require elaboration that Supreme Court has subject matter jurisdiction of mortgage foreclosure actions, that a plaintiff's participation in settlement negotiations constitutes good cause for its forbearance in entering judgment on default or that the failure to assert lack of standing in the answer or by way of a pre-answer motion operates as a waiver of such affirmative defense (CPLR 3211[e]). Therefore, a defendant's failure to assert the standing defense in a timely manner should not be excused merely because its answer, failing to assert the defense, was rejected as untimely (*cf. Wells Fargo Bank, N.A. v. Forde-White*, 38 Misc 3d 1209[A], 2013 NY Slip Op 50029[U], *3-4 [Sup Ct, Kings County 2013] [the defendant was permitted to assert lack-of-standing defense in motion to dismiss where the defendant never served an answer]). To the contrary, the opportunity to interpose a second answer does not afford occasion to interpose a defense governed by CPLR 3211(e) that was

not asserted in the original answer (*Addesso v Shemtob*, 70 NY2d 689 [1987]). Thus, whether defendant's asserted lack of standing defense, interposed for the first time in her post-answer motion to dismiss, might constitute an "arguably meritorious affirmative defense," as the majority supposes, is immaterial.

Accordingly, the order should be affirmed in all respects.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13915-
13916 J.P. Morgan Securities Inc., Index 650005/09
Plaintiff-Respondent,

-against-

Jason Ader, et al.,
Defendants-Appellants.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Jed I. Bergman of counsel), for appellants.

Satterlee Stephens Burke & Burke LLP, New York (James J. Coster of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 3, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment dismissing defendants' counterclaim for negligent misrepresentation, affirmed, without costs. Order, same court and Justice, entered April 17, 2014, which granted plaintiff's motion to strike defendants' demand for a jury trial on their counterclaim for fraudulent inducement, reversed, on the law, without costs, and the motion denied.

The motion court properly dismissed defendants' counterclaim for negligent misrepresentation. "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the

existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). In commercial cases "a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such than in morals and good conscience the one has the right to rely upon the other for information" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Reliance on the statements must be justifiable, and "not all representations made by a seller of goods or a provider of services will give rise to a duty to speak with care" (*id.*). "Rather, liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*id.*). In order to impose tort liability in a commercial case, "there must be some identifiable source of a special duty of care" (*id.* at 264).

In this context we have held that such a special duty will be found "if the record supports a relationship so close as to approach that of privity" (*see North Star Contr. Corp. v MTA*

Capital Constr. Co., 120 AD3d 1066, 1069 (1st Dept 2014] [internal quotation marks omitted). Generally, however, an arm's-length business relationship between sophisticated parties will not give rise to a confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation (*Greentech Research LLC v Wissman*, 104 AD3d 540 [1st Dept 2013]).

The evidence on the record before us, which includes allegations of plaintiff's superior knowledge of the hedge fund business and its past dealings with defendant Ader, who had worked for plaintiff's predecessor in interest for some years, is not sufficient to establish a special relationship that would justify defendants' reliance on plaintiff's alleged misrepresentations (*see Kimmell v Schaefer*, 89 at NY2d 257; *Greentech Research*, 104 AD3d at 540).

With respect to the issue of the application of the jury waiver provision in the parties' agreement to defendants' counterclaim for fraudulent inducement, we find that the court erred in granting plaintiff's motion to strike defendants' jury trial demand.

We have previously held that a contractual jury waiver provision is inapplicable to a fraudulent inducement cause of

action that challenges the validity of the underlying agreement (*see China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435, 436-437 [1st Dept 2011]; *Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264, 265 [1st Dept 2005]). Moreover, "[i]t is of no consequence that the [counterclaim] does not contain the word 'rescission' or expressly state that it challenges the validity of the . . . agreement" (*Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 102 AD3d 487, 488 [1st Dept 2013]). In cases where the fraudulent inducement allegations, if proved, would void the agreement, including the jury waiver clause, the party is entitled to a jury trial on the claim (*see Bank of N.Y. v Cheng Yu Corp.*, 67 AD2d 961 [2d Dept 1979]; *see also Ferry v Poughkeepsie Galleria Co.*, 197 AD2d 913 [4th Dept 1993]).

As our dissenting colleague acknowledges, "a defrauded party to a contract may elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud" (*Big Apple Car v City of New York*, 204 AD2d 109, 110-111 [1st Dept 1994]). As a result, a party alleging fraudulent inducement that elects to bring an action for damages, as opposed to opting for rescission may, under certain circumstances, still challenge the validity of the agreement (*see Ambac Assur. Corp., 102 AD3d*

at 488).

Thus, where, as here, a party sufficiently pleads that it was fraudulently induced to enter into a contract, and only relies on the agreement as a basis for its defense against breach of contract allegations and a claim for reformation to recover overpayments, it is not precluded from challenging the validity of the contract for purposes of avoiding the jury waiver clause with respect to the adjudication of its fraudulent inducement claim (*see Ambac Assur. Corp., 102 AD3d at 488*; *Wells Fargo Bank*, 18 AD3d at 265). Although the dissent contends otherwise, we find that the facts of this case fall within *Ambac's* parameters, and thus reinstate defendants' demand for a jury trial.

We have considered the parties' remaining arguments and find them to be without merit.

All concur except Andrias, J. who dissents in part in a memorandum as follows:

ANDRIAS, J. (dissenting in part)

I agree with the majority that Supreme Court properly awarded summary judgment to plaintiff dismissing defendants' counterclaim for negligent misrepresentation. However, because defendants' primary claims are for reformation and monetary damages, which do not challenge the validity of the agreements at issue, I disagree with the majority with respect to its holding that the court erred when it granted plaintiff's motion to strike defendants' demand for a jury trial on their counterclaim for fraudulent inducement. Accordingly, I dissent in part.

Following extensive negotiations, in July and August 2003, defendant Jason Ader and plaintiff's predecessor in interest, Bear Stearns, entered into a series of preliminary agreements in connection with an investment by Bear Stearns in Hayground Cove, a hedge fund that Ader was developing. These included a Letter Agreement setting forth the proposed terms of the parties' deal, subject to the execution of definitive agreements.

On November 24, 2003, the parties executed a "Revenue Sharing Agreement" (RSA) and an "Investment Agreement." These agreements provided that in exchange for Bear Stearns's seed investment, Hayground would pay Bear Stearns 25% of "gross revenues" less: (i) eligible operating expenses, up to a maximum

of $600,000; (ii) customary marketing fees paid to non-affiliated third parties that were the result of arm's-length negotiations; and (iii) payments on certain loans to Hayground for startup expenses.

Following Bear Stearns's investment, Hayground began to attract further investors, and grew in size. In February 2005, at defendants' request, the parties executed the First Amendment to the RSA which allowed the "Expense Cap" to increase commensurate with Hayground's assets under management. In June 2005, the parties again modified their deal through a "Global Agreement" and a 2005 Investment Agreement under which Bear Stearns, pursuant to Hayground's request, switched its investment to Hayground's newly formed market-neutral fund. The 2005 Investment Agreement, however, specifically acknowledged that "the Partnership Agreement, this Agreement, the Global Agreement and the Revenue Sharing Agreement are the valid and binding obligations of the Partnership, enforceable against the Partnership in accordance with their respective terms."

In January 2009, plaintiff commenced this action, alleging that defendants miscalculated revenue-sharing payments by deducting the Expense Cap from the 25% revenue share, rather than from gross revenues; deducting amounts from revenues for

marketing expenses not actually paid to third-party marketers; and inflating the Expense Cap by improperly calculating assets under management to include leverage and short positions rather than basing it on investor equity alone. Plaintiff asserted causes of action for breach of contract and a declaratory judgment, and sought damages to be determined at trial of not less than $8,000,000.

In their answer, defendants denied liability and asserted multiple affirmative defenses, including that "[p]laintiff's claims are barred, in whole or in part, by the doctrines of reformation and/or mutual mistake." Defendants also asserted counterclaims for fraudulent inducement, negligent misrepresentation, and reformation.

In support of their fraudulent inducement and negligent misrepresentation counterclaims, defendants alleged, inter alia, that: (i) in reliance on Bear Stearns's false or reckless representations concerning marketing assistance, access to Bear Stearns's prime brokerage operation, and introductions to potential investors, defendants selected Bear Stearns's seeding offer over alternative and more favorable offers; (ii) "notwithstanding repeated and continuing false assurances from Barry Cohen [of Bear Stearns]..., by late March or early April of

2004, it became clear that, as Cohen finally admitted, Bear Stearns would not ... fulfill its representations, ... ostensibly due to various regulatory and legal obstacles to its doing so"; and (iii) as a result, "Hayground was forced to spend its own resources in an attempt to replace Bear Stearns's assistance [and] failed to realize additional profits." As a remedy for plaintiff's alleged fraud and/or negligent misrepresentation, defendants did not seek to rescind the RSA. Rather, they sought damages in an amount to be proven at trial.

In support of their reformation counterclaim, defendants alleged:

> "To the extent that the written terms of the RSA fail to reflect the agreement on revenue-sharing reached between Bear Ste[a]rns and Hayground and set forth in the Letter Agreement, that failure was on account of either mutual mistakes by the parties, or unilateral mistake by Hayground and improper conduct by Bear Stearns in seeking to conceal the mistake through expressing its agreement with Hayground's understanding of the parties' agreement."

Stating that the RSA should be reformed to provide that the Expense Cap is deducted after calculating Bear Stearns's 25% Revenue Share, as provided in the Letter Agreement, defendants sought damages "in an amount to be proven at trial, including, without limitation, all payments made to Bear Stearns that improperly overpaid Revenue Share based on the RSA's erroneous

reflection of the parties' intent."

In July 2012, plaintiffs filed a note of issue noticing a bench trial. In August 2012, defendants filed a demand for a jury trial on the fraudulent inducement counterclaim. Plaintiff moved to strike the jury demand on the grounds that the RSA provided that the parties "waive all right to trial by jury in any action or proceeding to enforce or defend any rights under [the RSA]" and that in any event defendants waived any right to a jury trial by joining their fraudulent inducement counterclaim seeking monetary relief with a claim seeking the equitable relief of reformation. Supreme Court held that the jury waiver in the RSA applied to the fraudulent inducement claim, and that, as a result, there was no need to address plaintiff's waiver-by-joinder argument.

Where a fraudulent inducement claim challenges the validity of the agreement, a provision waiving the right to a jury trial in any litigation arising out of the agreement does not apply (*see e.g. China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435, 436-437 [1st Dept 2011]; *Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264 [1st Dept 2005]). Where fraudulent inducement is the plaintiff's primary claim, "[i]t is of no consequence that the complaint does not contain the word

'rescission' or expressly state that it challenges the validity of the ... agreement" *(Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 102 AD3d 487 [1st Dept 2013]; *MBIA Ins. Corp. v Credit Suisse Sec. [USA], LLC*, 102 AD3d 488 [1st Dept 2013]).

Relying on *Ambac*, the majority finds that because defendants have sufficiently pleaded that they were fraudulently induced to enter into a contract, and only rely on that contract "as a basis for [their] defense against breach of contract allegations and a claim for reformation to recover overpayments, [they are] not precluded from challenging the validity of the contract for purposes of avoiding the jury waiver clause with respect to the adjudication of [their] fraudulent inducement claim." Because I believe that, on the particular facts presented, Supreme Court correctly determined that the jury waiver in the RSA applies, I respectfully disagree.

A party alleging fraudulent inducement may "elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud" (*Big Apple Car v City of New York*, 204 AD2d 109, 110-111 [1st Dept 1994]). "The measure of damages recoverable for being fraudulently induced to enter into a contract which otherwise would not have been made is indemnity

for [the] loss suffered through that inducement" (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986] [internal quotation marks omitted]; *RKB Enters. v Ernst & Young*, 182 AD2d 971 [3d Dept 1992]).

Here, defendants' primary claims are for reformation and monetary damages, and they did not raise fraudulent inducement as an affirmative defense to plaintiff's breach of contract claim. In their counterclaims for fraudulent inducement and negligent misrepresentation, defendants confirm that after learning of the alleged false or reckless misrepresentations that induced them to enter the RSA in 2004, they entered the 2005 Global Agreement and the 2005 Investment Agreement, in which they confirmed that the RSA remained a binding agreement. Moreover, defendants continued to perform under the RSA thereafter.

Although defendants do assert a counterclaim based on fraudulent inducement, they seek money damages, not rescission. Whereas rescission is based on a disaffirmance of the contract and seeks to place the parties in the status quo ante the transaction, an award of damages affirms the contract while penalizing the fraudulent party for his breach (*see VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 56 [1st Dept 2013]; *Vitale v Coyne Realty*, 66 AD2d 562, 568 [4th

Dept 1979] [Callahan, J. dissenting]). Furthermore, defendants assert a separate counterclaim seeking to reform the RSA with respect to the Expense Cap and to recover all overpayments of revenue share based on the RSA's alleged erroneous reflection of the parties' intent, thereby contesting the validity of Bear Stearns's contractual right to those payments under the RSA.

Thus, as the motion court found, unlike *Ambac*, where there was nothing to indicate that the plaintiff elected to affirm the contract after discovering the defendant's alleged fraud, here, "Hayground's actions — seeking damages and, in particular, reformation instead of rescission, declining to assert fraud as a defense to the breach of contract claim, and ratifying the RSA through the 2005 amendment — unequivocally demonstrate that it has elected to affirm the RSA and not challenge its validity."

Insofar as defendants argue that their fraudulent inducement counterclaim does not seek to enforce or defend any rights under

the RSA, the argument is unavailing since the parties did not specify that the waiver would operate as to claims, but rather as to an "action or proceeding."

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14549 The People of the State of New York, Ind. 2472/08
Respondent,

-against-

Bakshi Ram,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Colleen Duffy, J.), rendered March 20, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

Defendant's motion to suppress his written and videotaped statements was properly denied. The hearing record, including evidence of defendant's ability to give detailed answers to nonleading questions, establishes that his intelligence and ability to understand English were sufficient to enable him to make a knowing and intelligent waiver of his rights (*see People v Williams*, 62 NY2d 285, 288-289 [1984]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence

supports the inference that when defendant stabbed his wife, he did so with, at least, the intent to cause serious physical injury.

Viewing the evidence in the light most favorable to defendant, we find there was no reasonable view of the evidence to support the submission of second-degree manslaughter to the jury under the theory advanced by defendant.

While we are aware of the testimony of physical and emotional abuse by the wife towards the defendant, that defendant had lived a productive, crime-free life prior to this offense, that he has two sons now living alone with an uncle, that it was the defendant who called 911 to report what he had done, and that he attended to his wife until emergency responders arrived, these facts were all before the sentencing judge and we perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14788-
14789-
14790 The People of the State of New York,
Respondent,

-against-

Elvis Nunez,
Defendant-Appellant.

Ind. 5108/08

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Elvis Nunez, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered November 30, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of 10 years, unanimously affirmed. Order (same court and Justice), entered on or about October 16, 2012, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that defendant participated in a drug transaction by acting as a steerer and salesperson.

The evidence at the *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom during the undercover officers' testimony (*see Waller v Georgia*, 467 US 39 [1984]), and the closure order did not violate defendant's right to a public trial. Furthermore, the court implicitly or explicitly considered alternatives to full closure (*see Presley v Georgia*, 558 US 209 [2010]; *People v Echevarria*, 21 NY3d 1, 14-19, *cert denied sub nom. Johnson v New York and Moss v New York*, ___ US ___, 134 S Ct 823 [2013]). There is no merit to defendant's assertion that the court failed to consider his proposal that a court officer ask entrants to the courtroom for their identities and reasons for entering. Immediately after defendant made this suggestion, the court made a statement that can fairly be read as finding the suggestion impracticable, given the realities of a calendar laden with drug cases and the resultant frequent presence of persons charged with drug trafficking. Such realities have been cited by courts in granting closure (*see People v Pepe*, 235 AD2d 221 [1st Dept 1997], *lv denied* 89 NY2d 1039 [1997]; *People v Gross*, 179 AD2d

138, 142 [1st Dept 1992], *lv denied* 80 NY2d 832 [1992]).

Defendant's motion to vacate the judgment raises issues concerning the felony complaint, indictment and grand jury proceedings. Those claims are procedurally barred (*see* CPL 440.10[2][b]), as well as being without merit.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14791-
14792 Efrain Matos,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Index 309441/09

Stecklow Cohen & Thompson, New York (David A. Thompson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Pamela Horan of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 20, 2013, which denied plaintiff's motion to vacate orders, same court and Justice, entered April 10, 2013 and July 29, 2013, granting defendant's motion for summary judgment dismissing the complaint on default, unanimously reversed, on the law, without costs, the motion to vacate the orders granted, and the matter remanded for further proceedings in accordance herewith. Appeal from order, same court and Justice, entered December 17, 2012, unanimously dismissed, without costs, as academic.

While defendant's motion for summary judgment was pending, plaintiff's counsel moved to withdraw as counsel. In December

2012, the motion court granted counsel's application and ordered the case stayed "for 45 days from the date of service of a copy of this order." However, plaintiff was not served with the order, and, in April 2013, defendant's motion for summary judgment was heard and granted in his absence. The April 23, 2013 order granting the motion on default directed defendant to settle an order, which order was entered July 29, 2013. Plaintiff then obtained new counsel and moved to vacate these two orders on the ground that the grant of summary judgment while the action was stayed was a nullity.

Plaintiff is correct. After his former counsel was granted leave to withdraw, the action was stayed by court order and operation of CPLR 321(c) (*Fan v Sabin*, 125 AD3d 498 [1st Dept 2015]). Because Plaintiff was never served with the order dismissing his attorney, the 45 day stay never expired.

Defendant cannot avoid the stay by arguing that it did not go into effect until served on plaintiff, since the failure to serve the order cannot accrue to defendant's benefit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14793 In re Alkaren Parris, Index 101635/13
Petitioner,

-against-

Nirav R. Shah, M.D.,
M.P.J., etc.,
Respondent.

_____

Nnebe & Associates, P.C., Brooklyn (O. Valentine Nnebe of counsel), for petitioner.

Eric T. Schneiderman, New York (Jaclyn D. Saffir of counsel), for respondent.

_____

Determination of respondent Commissioner of the New York State Department of Health, dated August 6, 2013, which, among other things, after a hearing, adopted the Administrative Law Judge (ALJ)'s recommendation to sustain the first three charges of patient abuse and/or neglect by petitioner, a certified nurse's aide, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered April 16, 2014), dismissed, without costs.

Substantial evidence, including consistent testimony from several witnesses, photographs of the 91-year-old resident's

bruises, and the geriatric center's records, supports the determination that petitioner pushed the resident into a bathroom wall, pulled the resident's hair, and intimidated the resident by demanding an explanation as to why she had reported $300 to be missing from her room and had implicated petitioner (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). There is no basis for disturbing the ALJ's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Further, hearsay evidence, which was corroborated by photographic evidence and other business records, was properly relied upon in making the determination (*see Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]). Petitioner's right to due process was not violated by the resident's absence at the hearing (*see Pena v Robert K. Hughes* 121 AD3d 550 [1st Dept 2014]). The record supports the ALJ's finding that the resident

was intimidated and afraid to testify.

We have considered petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14794 Angelo Amante, et al., Index 108650/10
Plaintiffs-Respondents, 590607/12

-against-

Pavarini McGovern, Inc., et al.,
Defendants-Appellants,

Interstate Industrial Corp.,
Defendant-Respondent.

- - - - -

Pavarini McGovern, Inc., et al.,
Third-Party Plaintiffs-
Appellants-Respondents,

-against-

Peter Scalamandre & Sons, Inc.,
Third-Party Defendant-
Respondent-Appellant.

_____

Barry McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants/appellants-respondents.

Perry Van Etten Rozanski & Primavera, LLP, New York (Amara S. Faulkner of counsel), for respondent-appellant.

Slavin & Slavin, New York (Barton L. Slavin of counsel), for Angelo Amante and Deborah Amante, respondents

Law Offices of Leon R. Kowalski, Brooklyn (William A. Prinsell of counsel), for Interstate Industrial Corp., respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 19, 2014, which, to the extent appealed from, granted plaintiffs' motion for partial summary judgment on their

Labor Law § 240(1) claim against defendants Pavarini McGovern, Inc. and Pavarini McGovern, LLC (collectively, Pavarini) and AB Green Gansevoort, LLC, denied Pavarini and AB Green's motion for summary judgment on their cross claims against defendant Interstate Industrial Corp. for common-law and contractual indemnification and on their claims against third-party defendant (Scalamandre) for contractual indemnification and breach of a contract to procure insurance, and denied Scalamandre's motion for summary judgment dismissing the third-party claim for contractual indemnification, unanimously modified, on the law, to grant Pavarini and AB Green's motion for summary judgment on their claim against Scalamandre for contractual indemnification and breach of a contract to procure insurance, and otherwise affirmed, without costs.

Contrary to Pavarini and AB Green's argument, the work site was not closed at the time of plaintiff Angelo Amante's accident. The accident occurred as plaintiff crossed the job site upon arriving early for work and entering through an open gate, one of several opened by Pavarini every morning before work commenced (*see Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431 [1st Dept 2012]). The excavation pit into which plaintiff fell presented an elevation-related hazard covered by Labor Law §

240(1) (*see Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234 [1st Dept 1997]). Since there is no evidence that he was aware of a warning against walking through the excavation area or that he unreasonably disregarded any such warning, and the only entrance provided to plaintiff required traversing the subject area, plaintiff cannot be found to be the sole proximate cause of his accident (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]).

Pavarini and AB Green are not entitled to summary judgment on their claims against Interstate for common-law and contractual indemnification since issues of fact exist whether Interstate or another contractor performed the excavation into which plaintiff fell and whether Pavarini and AB Green were negligent in allowing plaintiff access to the job site through the excavation area or in failing to illuminate the area properly. They are, however, entitled to summary judgment on their claim against Scalamandre for contractual indemnification. The broad indemnification clause provides for indemnification for injuries arising out of or in connection with the performance of the work of the subcontractor Scalamandre under the subcontract, whether caused in whole or in part by the subcontractor (*see Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548 [1st Dept 2013]; *Burton v CW Equities,*

LLC, 97 AD3d 462, 463 [1st Dept 2012]).

Pavarini and AB Green are also entitled to summary judgment on their breach of contract claim against Scalamandre for failure to procure insurance since they made a prima facie showing that the insurance policy Scalamandre procured did not provide $5 million in coverage, as required by its trade contract, and Scalamandre failed to raise a triable issue of fact in opposition.

We note that the record contains no cross claim by Pavarini and AB Green against Interstate for breach of a contract to procure insurance. To the extent they asserted such a claim, they are not entitled to summary judgment thereon since they made no showing that Interstate failed to procure the required insurance.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14795 The People of the State of New York, Ind. 649/12
Respondent,

-against-

Earl Jones,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered December 20, 2012, convicting defendant, after a jury trial, of burglary in the third degree and criminal trespass in the third degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that defendant entered a truck with intent to commit a crime (*see People v Castillo*, 47 NY2d 270, 277-278 [1979]; *People v Gilligan*, 42 NY2d 969 [1977]). Defendant entered the truck after looking in all directions, he moved his head up and down in the

truck in a manner suggesting that he was looking for items to steal, and there is no evidence to suggest that he had any noncriminal purpose for entering the truck.

Since defendant's objection to evidence of an unidentified woman's exclamation to a police officer did not articulate any of the arguments raised on appeal, those arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We have considered and rejected defendant's argument that his trial counsel rendered ineffective assistance by failing to make the appropriate objection.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14796 In re Nia Dara B.,
Petitioner-Appellant,

-against-

Jonathan B.,
Respondent-Respondent.

_____

Rottenstreich & Ettinger, LLP, New York (Dan Rottenstreich of counsel), for appellant.

Brostowin & Associates, P.C., New York (Terry A. Brostowin of counsel), for respondent.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about August 7, 2014, which, upon the mother's petition for modification of a child custody order granting the parties joint physical and legal custody, awarded respondent father primary physical custody of the parties' child, with access to the mother, unanimously reversed, on the law and the facts, to award primary physical custody to the mother, with access to the father, and otherwise affirmed, without costs.

The Referee's time limitation of the trial in this case did not deprive the mother of a fair trial (*see Alix A. v Erika H.*, 45 AD3d 394, 394-395 [1st Dept 2007]). The Referee was familiar with the history of this case (*see id.*), and the mother was able to present her case and cross-examine the father within the

allotted time.

Nevertheless, the Referee's award of primary physical custody to the father lacks a sound and substantial basis in the record (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). The Referee's determination was based primarily on the fact that the father recently moved from Austin, Texas to Kaufman, Texas near his sizable extended family, whereas the mother has a very small family. The Referee also found that the father is currently more stable than the mother because he is currently gainfully employed and is able to rent an apartment for himself and the child, whereas the mother has no income and lives with her boyfriend, who has no obligation to support her and the child. However, the Referee failed to consider that the mother is in a long-term relationship with her boyfriend, and that the Brooklyn home they have lived in for over two years is the only stable home environment that the five-year-old child has known. Further, the child was born in New York and has lived here consistently for the first part of her life, is very close to her maternal grandmother, who lives in New York, has close friends here, and was accepted into a French dual-language program for kindergarten in New York. In addition, the Referee noted that the mother, who

supported the father financially for more than a year during their short marriage, has the credentials to find employment and would "always find a way" to provide for the child.

Although both parents are fit to act as a custodial parent, significant weight should have been given to the father's failure to comply with court orders to return the child from Texas to the mother on two separate occasions. When the court fashions orders regarding custody and access, a parent's commitment to comply with those orders must figure importantly in the court's decision. The mother alleged in her petition, which the father did not oppose until the day of the custody hearing, that the father refused to promote a strong and meaningful relationship between her and the child. Although the father testified that he would encourage the child's relationship with the mother, he had previously failed to comply with two court orders directing him to return the child to the mother in New York, and he has not expressed any concern that the mother, if awarded primary physical custody, would not provide him with access to the child.

Accordingly, we find that it is in the best interests of the child to award the mother primary physical custody, with the father having access to the child pursuant to the schedule expressed in the Referee's order (*see generally Eschbach v*

Eschbach, 56 NY2d 167, 171 [1982]).

Given the foregoing determination, we need not consider the mother's remaining contentions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14797 Barbara Kennedy, et al., Index 159310/13
Plaintiffs-Appellants,

-against-

Jahan Yousaf, et al.,
Defendants-Respondents,

Sony Music Entertainment, et al.,
Defendants.

_____

Ritholz Levy Sanders Chidekel & Fields, New York (Jonathan D. Plaut and David Chidekel of counsel), for appellants.

Rosenberg & Giger P.C., New York (John J. Rosenberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 6, 2014, which granted defendants' motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

Plaintiffs failed to establish that defendants transacted business in New York from which plaintiffs' causes of action arise (*see* CPLR 302[a][1]). Plaintiffs' own New York activities relating to their management agreement with defendants cannot be attributed to defendants (*see Royalty Network, Inc. v Harris*, 95 AD3d 775 [1st Dept 2012]). The fact that defendants negotiated the agreement and communicated with plaintiffs via email and

telephone is insufficient to constitute the transaction of business in New York (*see SunLight Gen. Capital LLC v CJS Invs. Inc.*, 114 AD3d 521 [1st Dept 2014]). Contrary to their contention, plaintiffs did not demonstrate that defendants intended to take advantage of New York's unique resources in the entertainment industry (*see Royalty Network*, 95 AD3d at 776). Nor did plaintiffs show that defendants' two appearances in New York had a substantial relationship to plaintiffs' claims (*see e.g. Seneca Ins. Co. v Boss*, 256 AD2d 175 [1st Dept 1998]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14800 Victor Leandry, Index 101619/11
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents,

Prakash Badlani,
Defendant.

_____

Schwartz, Goldstone & Campisi, LLP, New York (Tara M. Kennedy of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered November 25, 2013, which, to the extent appealed from as limited by the briefs, granted the motion of defendants City of New York and Semyon Aynbinder for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this action for personal injuries allegedly suffered by plaintiff, a New York City police sergeant, while he was a passenger in a police vehicle driven by defendant Aynbinder, also a New York City police sergeant, when it was rear-ended by a vehicle driven by defendant Badlani, the testimony established

that, before the accident, Aynbinder had stopped the vehicle suddenly to avoid hitting a pedestrian who had darted into the street. Accordingly, the motion court properly granted summary judgment to the City and Aynbinder since the car was stopped when it was struck in the rear (*see Williams v Hamilton*, 116 AD3d 421 [1st Dept 2014]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]).

Neither the testimony that Aynbinder stopped the vehicle suddenly, nor plaintiff's assertion that he should have signaled his stop, are sufficient to raise an issue of fact as to whether Aynbinder was negligent in connection with the accident (*see Williams*, 116 AD3d at 422). Plaintiff's contention that Aynbinder was not maintaining a proper lookout is mere speculation, insufficient to defeat summary judgment (*see Cartagena v Martinez*, 112 AD3d 521, 522 [1st Dept 2013]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14801-
14801A The People of the State of New York, Respondent,

Ind. 1255N/12
SCI 5042N/12

-against-

Hassan J. Bates,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Richard Weinberg, J.), rendered on or about April 18, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14803 Sonya Whitten Latimore, Index 109456/11
Plaintiff-Appellant,

-against-

Kim E. Fuller, et al.,
Defendants,

Elma Kim,
Defendant-Respondent.

_____

Barret & Winn, Amityville (B. Joseph Barrett of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Dean N. Razavi of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Donna M. Mills, J.), entered April 8, 2013, which, inter alia, granted defendant Elma Kim's motion to dismiss the complaint as against her, and denied plaintiff's motion for jurisdictional discovery, deemed appeal from judgment, same court and Justice, entered May 17, 2013, dismissing the complaint as against said defendant (CPLR 5520[c]), and, so considered, said judgment unanimously affirmed, with costs.

Plaintiff neither established that New York courts may exercise jurisdiction over defendant Kim nor made a sufficient start to warrant jurisdictional discovery, since she failed to

show that the few contacts Kim had with New York are substantially related to plaintiff's claims (*see* CPLR 302[a][1]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]).

The complaint fails to state a cause of action for fraud since it alleges only that Kim submitted a perjurious affidavit concerning misappropriation of plaintiff's idea for a television series in plaintiff's prior federal action. Allegations of perjury committed in judicial proceedings do not form the basis of plenary civil actions for damages "except where the perjury is merely a means to the accomplishment of a large fraudulent scheme" (*Yalkowsky v Shedler*, 94, AD2d 684 [1st Dept 1983], *appeal dismissed in part, lv denied* in part 60 NY2d 600 [1983], quoting *Newin Corp. V Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217 [1975]). The aiding and abetting fraud cause of action,

which alleges vaguely that Kim helped other defendants "hide the ill gotten gains," is not pleaded with the requisite particularity (*see* CPLR 3016[b]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeney, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14804 The People of the State of New York, Ind. 110N/13
Respondent,

-against-

Michael Jones,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about April 17, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 14, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14805-
14805A Index 400781/12

Paul Hsu, et al.,
Plaintiffs-Appellants,

-against-

Liu & Shields LLP, et al.,
Defendants-Respondents.

_____

Paul Hsu, appellant pro se.

Cathy Huang, appellant pro se.

Liu & Shields LLP, Flushing (Carolyn Shields of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered February 8, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 16, 2013, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiffs' appeal from the order denying their combined motion to renew and reargue, which was essentially a motion to reargue given that plaintiffs did not identify any new evidence, was taken from an order from which no appeal lies (*see Hock v Byrne*, 5 AD3d 169 [1st Dept 2004]).

While the complaint alleges that "[t]his is an attorneys'

breach of agreement and malpractice case," it does also contain some allegations of defendants' fraudulent conduct. However, even affording the complaint a liberal construction and according plaintiffs the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the fraud allegations in the complaint are duplicative of plaintiffs' untimely legal malpractice claims (*see Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228, 228-229 [1st Dept 2003] [affirming dismissal of fraud claim as duplicative of the untimely legal malpractice claim, and noting that it was asserted in an attempt to circumvent the legal malpractice limitations period]; *see also Penner v Hoffberg Oberfest Burger & Berger*, 303 AD2d 249 [1st Dept 2003] [fraudulent concealment cause of action dismissed as duplicative of accounting malpractice claims]), and cannot be used by plaintiffs to circumvent the shorter statute of limitations for legal malpractice.

We reject plaintiffs' due process arguments since the record indicates that plaintiffs submitted papers to the motion court in

connection with the motions and, at oral argument, plaintiffs were given the opportunity to speak, but declined to do so.

We have considered the remainder of plaintiffs' arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14808 The People of the State of New York, Ind. 4148/12
Respondent,

-against-

Redron Cohen,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wylie, J.), rendered on or about April 10, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 14, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14809 Laura Susino, et al., Index 308901/10
Plaintiffs-Respondents,

-against-

Michael Panzer,
Defendant-Appellant.

_____

Baxter Smith & Shapiro, P.C., White Plains (Kimberly A. Carpenter of counsel), for appellant.

James Newman, P.C., Bronx (Kyle Newman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell Danziger, J.), entered May 29, 2013, which denied defendant's motion for summary judgment dismissing the complaint on the issue of liability or, alternatively, dismissing plaintiff Rosalia Susino's claims on the issue of serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant's and plaintiff Laura Susino's differing versions of the way the motor vehicle accident happened present issues of fact as to liability for the accident (*see Talansky v Schulman*, 2 AD3d 355, 357 [1st Dept 2003]). Defendant testified that plaintiffs' vehicle unlawfully crossed a double yellow line and passed one or more vehicles before colliding with his vehicle. Laura testified that defendant failed to yield the right of way

as he was exiting from a parking lot, and negligently entered the road against the flow of traffic. Contrary to defendant's contentions, the photographs of the accident location submitted by plaintiffs do not conclusively refute plaintiffs' testimony, and Laura's affidavit does not contradict her deposition testimony.

Defendant failed to establish prima facie that plaintiff Rosalia Susino did not sustain a serious injury as a result of the accident, since his own experts found significantly limited ranges of motion in Rosalia's cervical and lumbar spine, with a 65% limitation in the range of motion in her back nearly two years after the accident (*see Suazo v Brown*, 88 AD3d 602 [1st Dept 2011]). Moreover, while defendant's radiologist opined that the MRI films of Rosalia's cervical and lumbar spine showed only preexisting degenerative conditions, defendant also submitted other MRI reports finding disc bulges and herniations and Rosalia's treating physician's report causally relating the injuries to the accident. In any event, plaintiffs submitted the affirmed report of Rosalia's radiologist, who opined that the MRI findings were causally related to the accident, and the affirmed report of her treating physician, who found continuing limitations in range of motion and opined that her condition was

caused by the accident and was permanent (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

Defendant submitted no evidence refuting Rosalia's claim that she was disabled from performing her usual and customary activities for at least 90 of the first 180 days following the accident (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]). In any event, Rosalia's treating physician's report states that Rosalia was "totally disabled" and "unable to engage in any of her normal daily activities for at least four months immediately following the accident" (*see Castillo v Collado*, 83 AD3d 581 [1st Dept 2011]).

We have considered defendant's remaining contentions, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14810N Patricia Finn, Index 687/13
Plaintiff-Appellant, Dkt. 193/14

-against-

Frederick Piesco, Jr.,
Defendant-Respondent.

_____

Patricia Finn, Piermont, appellant pro se.

Mary Lou Chatterton, Goshen, for respondent.

_____

Order, Supreme Court, Rockland County (Gerald E. Loehr, J.), entered on or about August 19, 2013, transferred to this Court by order of the Supreme Court of New York, Appellate Division, Second Department, dated September 10, 2014 (*Finn v Piesco*, __ AD3d __, 2014 NY Slip Op 82981[U] [2d Dept 2014]), which, to the extent appealed from as limited by the briefs, denied plaintiff's motion seeking an award of pendente lite maintenance and counsel fees, and upward modification of a child support award, unanimously modified, on the law and the facts, and the matter remanded to Supreme Court, Rockland County, for recalculation of the child support award, and otherwise affirmed, without costs.

The Supreme Court providently exercised its discretion in imputing income of $75,000, to plaintiff based on her work history, education, and skills, thus deeming her income equal to

that reported on defendant's tax return and denying plaintiff's request for temporary maintenance (*Lennox v Weberman*, 109 AD3d 703, 703 [1st Dept 2013]; *see also Hickland v Hickland*, 39 NY2d 1 [1976], *cert denied* 429 US 941 [1976]; *Osha v Osha*, 101 AD3d 481, 481 [1st Dept 2012]). Supreme Court correctly concluded that plaintiff failed to explain why, as an experienced attorney with a master's degree in public administration and a real estate license, she earned no income in 2012. Plaintiff failed to submit any evidence to refute defendant's claim that she held a valid real estate license. She also failed to explain how the Ninth Judicial District Grievance Committee's investigation into complaints against her, which seem to have been fairly limited in scope and did not result in any disciplinary suspensions, would prevent her from operating her law practice or otherwise earning any income for years at a time, as she claims. She also failed to submit documentation to support her claim that defendant, a carpenter, made $125,000, rather than the $75,000 reported on his tax return.

The Supreme Court also providently exercised its discretion in denying plaintiff's application for interim counsel fees, as she failed to show any disparity in the parties' income. Pursuant to Domestic Relations Law § 237, the court considered

the financial circumstances of the parties together with all of the circumstances of the case (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]; *see also Johnson v Chapin*, 12 NY3d 461 [2009]).

As for plaintiff's pendente lite application for an upward modification of the child support award entered by the Westchester County Family Court, however, plaintiff met her burden of showing that a modification is warranted (*see Colyer v Colyer*, 309 AD2d 9 [1st Dept 2003]). In the Family Court proceeding, the parties had consented to an award of $153 per week for the parties' two children, based on the husband having an adjusted annual income of about $30,000. In opposition to plaintiff's application in the instant proceeding, however, he submitted a net worth statement and tax return disclosing at least $75,000 in adjusted gross income. Plaintiff also submitted evidence that she and the children were receiving food stamps, and that she had substantial outstanding bills for household necessities and the children's expenses. In light of the substantial discrepancy between the amount of income attributed to the husband in the Family Court order and the amount disclosed subsequently, the Supreme Court erred in concluding that the amount agreed upon in Family Court was appropriate. Accordingly, the application is granted to the extent of remanding for further

proceedings, to redetermine the award of temporary child support with a final award to be made after trial (*see Matter of Brescia v Fitts*, 56 NY2d 132, 138, 141 [1982]; *Mandell v Karr*, 7 AD3d 382 [1st Dept 2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13412N Robert E. Wilson, III, Index 650915/12
Plaintiff-Appellant,

-against-

Daniel Valente Dantas, et al.,
Defendants-Respondents,

Opportunity Equity Partners, L.P., et al.,
Defendants.

_____

Cozen O'Connor, New York (Matthew J. Weldon and Terrance G. Reed of the bar of the Commonwealth of Virginia and the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Boies, Schiller & Flexner LLP, New York (Philip C. Korologos of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 27, 2013, modified, on the law, to deny the motion as to the first, second, fourth and sixth through eighth causes of action, and otherwise affirmed, without costs.

Opinion by Acosta, J. All concur except DeGrasse, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
Leland G. DeGrasse
Darcel D. Clark, JJ.

650915/12
Index 13412N

_____x

Robert E. Wilson, III,
Plaintiff-Appellant,

-against-

Daniel Valente Dantas, et al.,
Defendants-Respondents,

Opportunity Equity Partners, L.P., et al.,
Defendants.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered August 27, 2013, which granted defendants Daniel Valente Dantas, Opportunity Equity Partners, Ltd. and Opportunity Invest II, Inc.'s motion to dismiss the complaint as against them for lack of personal jurisdiction.

Cozen O'Connor, New York (Matthew J. Weldon, Martin Gusy of counsel), and Lankford & Reed, PLLC, Alexandria, VA (Terrance G. Reed of the bar of the Commonwealth of Virginia and the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Boies, Schiller & Flexner LLP, New York (Philip C. Korologos, William D. Marsillo and Benjamin D. Battles of counsel), for respondents.

ACOSTA, J.

In this appeal we consider whether New York courts may exercise personal jurisdiction over defendants based on the establishment of a foreign investment program, where the operative contracts establishing the program were negotiated and executed in New York. Plaintiff appeals from an order dismissing his claims against defendants Dantas, Opportunity Equity Partners, Ltd., and Opportunity Invest II, Inc. (collectively, the Opportunity defendants or defendants) for lack of personal jurisdiction.[1] We find that, because plaintiff's claims arise from defendants' transaction of business in New York, CPLR 302(a)(1) confers personal jurisdiction over defendants.

Background

The complaint alleges the following facts, which are relevant to this appeal and accepted as true for the purposes of a motion to dismiss.[2] In the 1990s, a number of government-owned

[1] Defendants Citibank, N.A., International Equity Investments, Inc., Citigroup Venture Capital International Brasil, L.L.C., and Citigroup Venture Capital International Brasil, L.P. (collectively, the Citibank defendants) are no longer parties to this action, since they successfully removed the case to federal court, where plaintiff's claims against them were dismissed.

[2] The relatively complicated facts are succinctly stated in the order by the motion court in this action (40 Misc 3d 1236[A], 2013 NY Slip Op 51439[U]), and with greater detail in the related federal case of *Wilson v Dantas* (12 Civ 3238 [GBD], 2013 WL

enterprises in Brazil were undergoing privatization in response to the country's economic woes. Plaintiff, a Citibank employee at the time, devised a side-by-side investment program to enable Citibank to invest in the privatizations.[3] Because the U.S. Office of the Comptroller of the Currency precluded Citibank from investing directly in Brazil, the investment scheme relied on the formation of a Cayman Islands investment fund targeted at Brazil. Citibank, defendant Dantas, and plaintiff created the fund, a limited partnership eventually named Opportunity Equity Partners, L.P. (the Fund). In order to manage the Fund and two co-investment entities that would invest alongside it – one of which was defendant Opportunity Invest II, Inc. (OI-II), a British Virgin Islands corporation controlled by Dantas – the parties created a general partner entity known as Opportunity Equity Partners, Ltd. (OEP), headed by Dantas.

At Citibank's direction, plaintiff moved to Brazil in or around August 1997 to assist with the management of the Fund as

---

92999, 2013 US Dist LEXIS 3475 [SD NY Jan. 7, 2013], *affd* 746 F3d 530 [2d Cir 2014]).

[3] The side-by-side investment strategy, as explained in the complaint, entailed investing "in conjunction with other co-investors, and then divest[ing] these holdings at an appropriate time under the same terms and conditions to maximize the return on investment and to generate profits on a pro rata basis for all participants from the divestment of the portfolio controlled by the General Partner [Opportunity Equity Partners, Ltd. (OEP)]."

an employee and shareholder of OEP with a 1% ownership interest. Before departing from New York and joining OEP, plaintiff negotiated those terms and secured a promise from Dantas that he would receive 5% of the "carried interest" (i.e., the total profits owed to OEP).

In order to fully implement the investment plan, Citibank's New York lawyers drafted several contracts, which included an Operating Agreement (setting forth the terms of the investment program between the Fund and the co-investors and designating plaintiff and Dantas, among others, as principals of OEP), a Limited Partnership Agreement (entered into between Citibank entities and the Fund), and a Shareholder Agreement for OEP (between plaintiff, defendants, and others, setting forth the terms of compensation and the ownership interests of the shareholders). In December 1997, the parties met in New York and simultaneously executed all three agreements.

In 2005, Citibank commenced an action against the Opportunity defendants in the Southern District of New York in order to take control of the Fund and replace the original general partner, OEP, with a wholly owned subsidiary of Citibank (CVC Brasil LLC). Citibank claimed that Dantas and OEP breached fiduciary duties and contractual obligations under the Operating Agreement and Limited Partnership Agreement. That litigation, to

which plaintiff was not a party, ended in 2008 with a confidential settlement agreement. Plaintiff alleges that the settlement agreement resulted in the distribution of profits, including the portion of the carried interest to which he was entitled, and that Dantas and OEP had previously represented to him that he would receive his 5% stake in the carried interest as part of the settlement. To date, plaintiff has not received that compensation, and defendants have refused to disclose to him the terms of the settlement agreement, despite his contention that the Shareholder Agreement entitles him to access to all information about the business and financial affairs of OEP.

In March 2011, plaintiff commenced a federal action against the Citibank defendants and the Opportunity defendants in the Southern District of New York (the 2011 SDNY litigation). The district court dismissed the action without prejudice for lack of subject matter jurisdiction, having determined that plaintiff was an American citizen domiciled in Brazil and therefore could not invoke diversity of citizenship under 28 USC § 1332.

In March 2012, plaintiff commenced the instant action in Supreme Court, seeking compensation allegedly owed to him for his role in the side-by-side investment program. He alleges that defendants earned billions of dollars in profits but never paid him the 5% of the carried interest promised to him by Dantas and

mentioned in the Shareholder Agreement. The Citibank defendants removed the action to the Southern District of New York and obtained a dismissal of the claims against them on the merits. The court declined to exercise supplemental jurisdiction over the Opportunity defendants and remanded plaintiff's remaining claims to Supreme Court, which granted defendants' motion to dismiss, finding that personal jurisdiction does not arise from the language of the agreements or under New York's long-arm statute (CPLR 302).

Plaintiff appeals, and we now modify the motion court's order.

Discussion

Under New York's long-arm jurisdiction statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state" (CPLR 302[a][1]). "By this single act statute . . . proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006] [internal quotation marks omitted], *cert denied* 549 US 1095 [2006]). Determining whether long-arm jurisdiction exists under the "transacts business" provision of

CPLR 302(a)(1), therefore, is a two-pronged inquiry: "a court must decide (1) whether the defendant transacts any business in New York and, if so, (2) whether [the] cause of action aris[es] from such a business transaction" (*Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 334 [2012] [internal quotation marks omitted]; *see also Johnson v Ward*, 4 NY3d 516, 519 [2005]). Both prongs must be met in order for personal jurisdiction to attach (*Johnson*, 4 NY3d at 519). "In effect, the 'arise-from' prong limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction" (*Licci*, 20 NY3d at 339-40).

The assertion of personal jurisdiction must also be predicated on a defendant's "minimal contacts" with New York to comport with due process (*George Reiner & Co. v Schwartz*, 41 NY2d 648, 650 [1977]; *International Shoe Co. v State of Washington*, 326 US 310, 316 [1945]). This requires an examination of the "quality and the nature of the defendant's activity" and a finding of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protection of its laws" (*George Reiner & Co.*, 41 NY2d at 650-651 quoting *Hanson v Denckla*, 357 US 235, 253 [1958] [internal quotation marks omitted]; *see also Licci*, 20 NY3d at 338).

The first prong of the inquiry, whether the Opportunity defendants transacted any business in New York, is satisfied, based on the Shareholder Agreement as well as the broader transaction establishing and implementing the side-by-side investment structure. First, contrary to the dissent's position, plaintiff alleges that the Shareholder Agreement outlining his compensation was negotiated *and* executed in New York. The Opportunity defendants look only to plaintiff's elaboration of his personal jurisdiction argument in Annex A of the complaint to support the contention that plaintiff failed to allege that the Shareholder Agreement was negotiated in New York. The body of the complaint, however, contains allegations that the agreement was negotiated here. Paragraph 21 of the complaint alleges that "the New York lawyers for Citibank drafted a variety of contractual documents in New York." Paragraph 24 further states that "[a]mong the documents drafted by Citibank's lawyers was a Shareholder Agreement for the General Partner CVC/Opportunity Equity Partners Ltd."

Accepting as true the allegation that all three agreements were drafted in New York by Citibank's lawyers, and drawing inferences in the plaintiff's favor, as we must on a motion to dismiss under CPLR 3211(a)(8) (*see Whitcraft v Runyon*, 123 AD3d 811 [2d Dept 2014]), we must infer that defendants engaged in

negotiations with Citibank in New York so that those agreements could be drafted; it is hardly believable that defendants would have attended a meeting in New York in December 1997 to execute these complex contracts without having negotiated their terms. Moreover, plaintiff alleges that Citibank's lawyers drafted the documents *in New York*. To determine that the agreements were not at least partially negotiated here, as the dissent would have us do, is to draw inferences in defendants' favor. Contrary to the dissent, however, our inference is appropriate, especially because there has been no discovery. And regardless, "the nature and purpose of a solitary business meeting conducted for a single day in New York may supply the minimum contacts necessary to subject a nonresident participant to the jurisdiction of our courts" (*Presidential Realty Corp. v Michael Sq. W.*, 44 NY2d 672, 673 [1978]). This was not a "purely ministerial" act of merely executing a contract in New York that had been negotiated elsewhere, which would likely be insufficient to confer personal jurisdiction (*see Abbate v Abbate*, 82 AD2d 368, 384 [2d Dept 1981]; *see also Presidential Realty Corp.*, 44 NY2d at 673-674; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:6). Therefore, although the complaint may have been inartfully drafted in part, we infer from the complaint that the Shareholder Agreement was negotiated in New

York.

In any event, even if the Shareholder Agreement had not been negotiated in New York, defendants do not dispute that plaintiff alleges that the other two contracts were negotiated and executed here. As discussed below, those contracts (in conjunction with the Shareholder Agreement) comprise a broader transaction of business in New York from which plaintiff's causes of action arise for the purposes of personal jurisdiction. Moreover, "the statutory test may be satisfied by a showing of other purposeful acts performed by [defendants] in this State in relation to the contract, albeit preliminary or subsequent to its execution" (*Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 457 [1965], *cert denied* 382 US 905 [1965]; *see also George Reiner & Co.*, 41 NY2d at 651 [discussing *Longines*]). Defendants entered New York to negotiate and execute contracts with New York entities and others for the purpose of establishing a large investment plan. The transaction laid the foundation for a continuing relationship between the parties, including Citibank in New York, which lasted for nearly a decade (*see George Reiner & Co.*, 41 NY2d at 653).[4] In sum, defendants purposefully availed

[4] Plaintiff alleges that, between 1997 and 2008, the parties engaged in daily or weekly phone calls and physical meetings while implementing the investment plan in Brazil, part of which related to the Shareholder Agreement, as discussed below, and

themselves of New York law by engaging in those negotiations, being physically present in New York at the time the contract was made,[5] and thereby establishing a continuing relationship between the parties (*see id.*).[6] Therefore, based on the totality of the circumstances and viewing the transaction as a whole, the Opportunity defendants can be said to have transacted business in New York (*see Scheuer v Schwartz*, 42 AD3d 314, 316 [1st Dept 2007]; *see also Hi Fashion Wigs v Hammond Adv.*, 32 NY2d 583, 587 [1973]).

Next, we must determine whether plaintiff's causes of action "arise from" defendants' New York contacts. The standard does not require plaintiff to have been involved in the transaction (*see generally Licci*, 20 NY3d 327); rather, plaintiff need only

---

while brokering the 2008 settlement.

[5] It is of no consequence that defendants may have been physically absent from New York during the contract negotiations, because they were physically present during the contract signing, and, in any event, the Court of Appeals has "recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions" (*Deutsche Bank Sec., Inc.*, 7 NY3d at 71).

[6] Plaintiff further alleges that, while he was still employed by Citibank in New York, he personally negotiated his compensation with defendant Dantas. This provides an additional allegation that Dantas purposefully transacted business with plaintiff in New York.

demonstrate that, "in light of all the circumstances, there [is] an articulable nexus or substantial relationship between the business transaction and the claim asserted" (*Licci*, 20 NY3d at 339 [internal citations and quotation marks omitted]). The Court of Appeals "ha[s] consistently held that causation is not required, and that the inquiry under the statute is relatively permissive" (*id.*).

Indeed, *Licci* illustrated just how permissive the standard is, when it found personal jurisdiction over a defendant bank that allegedly transferred money from a New York correspondent account to a foundation that used the money to finance rocket attacks in a foreign country (*id.* at 340-341). Although the plaintiffs' cause of action for breach of statutory duties arose indirectly from the defendant bank's New York contacts -- because "the specific harms suffered by plaintiffs flowed not from [the bank's] alleged support of a terrorist organization, but rather from rockets" -- the Court found that the bank's deliberate and frequent use of a New York account "to effect its support of [the foundation] and shared terrorist goals" satisfied CPLR 302(a)(1) because "at least one element [of plaintiff's claim arose] from the New York contacts" (*see id.*). Accordingly, the plaintiffs' claim was not "'too attenuated' from the transaction, or 'merely coincidental' with it" (*id.* at 340, quoting *Johnson*, 4 NY3d at

520).

Here, plaintiff's causes of action are even more closely related to defendants' New York contacts than was the case in *Licci*. To the extent his claims arise "solely" from the Shareholder Agreement, as the motion court determined, there is an articulable nexus between that transaction and his claims, because the Shareholder Agreement was formed in New York and his claims seeking compensation arise directly from it. Yet *Licci* dictates that we should not view the "arising from" prong so narrowly. That is, for the purposes of personal jurisdiction under CPLR 302(a)(1), plaintiff's causes of action do not arise "solely" from the Shareholder Agreement. Rather, his compensation was simply one component of a much broader business transaction, the establishment of the side-by-side investment program. The Shareholder Agreement was drafted by Citibank's New York lawyers and simultaneously executed with the other two operative agreements; despite the contracts' different forum selection clauses and merger clauses,[7] there was an articulable nexus between plaintiff's claim for compensation and the overall

[7] Because of our conclusion that personal jurisdiction is conferred by CPLR 302(a)(1), we need not reach the question of whether personal jurisdiction may be based on the interrelation of the three agreements and their various forum selection and merger clauses.

transaction that occurred in New York and the resulting investment scheme that continued for nearly a decade (*cf. Copp v Ramirez*, 62 AD3d 23, 30 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]). Indeed, the Shareholder Agreement was part of an integrated whole: among other things, it created ownership interests in OEP and required the shareholders to comply with the terms of the Operating Agreement and Limited Partnership Agreement. As in *Licci*, the facts as alleged surpass the minimum requirement of "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former" (*Licci*, 20 NY3d at 339).

Contrary to the dissent's conclusion, our decision is not "at odds" with the Second Circuit's decision in *Wilson v Dantas* (746 F3d 530 [2d Cir 2014]). While the Second Circuit determined that "Wilson's right to seek compensation stemmed . . . solely from OEP's Shareholder Agreement and Wilson's agreement with Dantas" (746 F3d at 537) in affirming the dismissal of his tort and contract claims against the *Citibank defendants on the merits*, the Court did not make that determination with respect to *personal jurisdiction over the Opportunity defendants*. Similarly, the dissent overlooks a critical distinction between an "arising from" inquiry to determine the merits of a claim and one to determine whether personal jurisdiction exists over the

defendants. As the *Licci* Court noted, the standards for deciding an "arising from" inquiry regarding personal jurisdiction "connote, at a minimum, a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, *regardless of the ultimate merits of the* claim" (*Licci*, 20 NY3d at 339 [emphasis added]). The Court continued by approvingly quoting the Second Circuit's certification of the questions for review, which stated in relevant part, "'[T]he jurisdictional nexus analysis directs [the court] to consider the relationship between . . . plaintiffs' claims and [the bank's] alleged transactions in New York,' not 'reach[] a conclusion that properly bears upon the ultimate merits of plaintiffs' claims'" (*Licci*, 20 NY3d at 339 n 10, quoting *Licci ex rel. Licci v Lebanese Can. Bank, SAL*, 673 F3d 50, 67-68 [2d Cir 2012]). Thus, as *Licci* illustrates, it is appropriate to view a business transaction through a broader lens when determining whether a plaintiff's claim arises from that transaction so as to confer personal jurisdiction over a defendant.

Finding that New York courts have personal jurisdiction over defendants in this case also comports with due process. "So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that

party is subjected to jurisdiction . . . ." (*Deutsche Bank Sec., Inc.*, 7 NY3d at 71). Such is the case before us. Defendants had sufficient minimum contacts with New York by purposefully entering the state to negotiate and execute contracts with Citibank, a New York entity, and Wilson. Those contracts established an ongoing relationship between the parties that lasted nearly 10 years. Two of the contracts (the Operating Agreement and Limited Partnership Agreement) included New York forum selection clauses, and, although the Shareholder Agreement included a Cayman Islands forum selection clause, the clause is non-exclusive and the agreement was substantially related to the broader transaction establishing the investment program, so defendants should have reasonably expected to defend their actions in New York.

Furthermore, we reject defendants' contention that the case should be dismissed on the ground of forum non conveniens, the application of which is "a matter of discretion to be exercised by the trial court and the Appellate Division" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 [1984], *cert denied* 469 US 1108 [1985]). Here, defendants have "failed to meet the heavy burden of demonstrating that plaintiff's selection of New York is not in the interest of substantial justice" (*Yoshida Print. Co. v Aiba*, 213 AD2d 275 [1st Dept 1995]). Although, as the dissent

notes, the Shareholder's Agreement contains a Cayman Islands choice-of-law provision and the "applicability of foreign law is an important consideration . . . and weighs in favor of dismissal" (*Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436, 438 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]), this case involves only one foreign jurisdiction's law (that of the Cayman Islands), as opposed to the laws of three foreign jurisdictions that merited dismissal on forum non conveniens grounds in *Flame S.A.* The burden on New York courts, therefore, is diminished.[8] This case is also distinguishable from *Flame S.A.*, where "th[e] case ha[d] no tie to New York" aside from the plaintiff's attempt to enforce a federal district court judgment that "merely recognized" a foreign judgment (107 AD3d at 438). While the remaining parties in this action are nonresidents of New York, the side-by-side investment program was designed and the related contracts negotiated and signed in New York, several of the entities involved are located here, and plaintiff argues that many of the witnesses and documents related to the litigation are here (*see Banco Ambrosiano v Artoc Bank & Trust*,

[8] While the dissent points out that plaintiff's complaint relies on "section 94(d) of the Caymans Companies Law" and "calls for relief '[i]n accordance with the procedure followed by the courts of the Cayman Islands, and the Privy Council,'" that call for relief only relates to plaintiff's plea for a declaratory judgment, which we are dismissing, as discussed below.

62 NY2d 65, 74 [1984]). Moreover, we perceive no undue hardship to defendants, who entered New York to transact business and continued to have contacts with New York entities during the performance of the contracts. Conversely, plaintiff notes that there is no right to a jury trial in either Brazil or the Cayman Islands, thus causing a "potential hardship to plaintiff[] if [he is] required to litigate the matter in [a foreign jurisdiction] where there is no right to trial by jury" (*Gyenes v Zionist Org. of Am.*, 169 AD2d 451, 452 [1st Dept 1991]; *see also Neville v Anglo Am. Mgt. Corp.*, 191 AD2d 240, 242-243 [1st Dept 1993]).[9] As such, defendants have not established the existence of "another forum 'which will best serve the ends of justice and the convenience of the parties'" (*Banco Ambrosiano,* 62 NY2d at 74, quoting *Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361 [1972]).

Therefore, the complaint should be reinstated, although not in its entirety. Dismissal of the third cause of action, which

---

[9] Despite the dissent's assertion that the "complaint call[s] for a determination in accordance with the procedural law of the Cayman Islands," choice of law provisions import only the foreign jurisdiction's substantive law, not its procedural rules (*Education Resources Inst., Inc. v Piazza*, 17 AD3d 513 [2d Dept 2005]; *see also Sears, Roebuck & Co. v Enco Assoc.*, 43 NY2d 389, 397 [1977]). Accordingly, the absence of a right to trial by jury in Brazil and the Cayman Islands is a significant consideration that weighs against dismissal for forum non conveniens.

alleges tortious interference with contract, is warranted, because defendants are parties to the Shareholder Agreement and, thus, could not have tortiously interfered with plaintiff's right to payment thereunder (*Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156 [1st Dept 1990], *lv denied* 76 NY2d 714 [1990]). The fifth cause of action, which alleges civil conspiracy, should also be dismissed because "[w]hile a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action" (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]). Furthermore, the ninth cause of action, which seeks a declaratory judgment should be dismissed since "plaintiff has an adequate, alternative remedy in another form of action" (*see Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered August 27, 2013, which granted defendants Daniel Valente Dantas, Opportunity Equity Partners, Ltd. and Opportunity Invest II, Inc.'s motion to dismiss the complaint as against them for lack of personal jurisdiction,

should be modified, on the law, to deny the motion as to the first, second, fourth and sixth through eighth causes of action, and otherwise affirmed, without costs.

All concur except DeGrasse, J. who dissents in part in an Opinion.

DEGRASSE, J. (dissenting in part)

This appeal is from an order granting a motion to dismiss the complaint by the only remaining defendants, Opportunity Equity Partners, Ltd. (Opportunity Ltd.), Opportunity Invest II, Inc. (Opportunity Invest) and Daniel Valente Dantas (collectively, the Opportunity defendants). The Opportunity defendants moved below for dismissal on the grounds of lack of personal jurisdiction and forum non conveniens. I dissent because I disagree with the majority's conclusion that personal jurisdiction under CPLR 302(a)(1) can be inferred from the complaint. Dismissal of the complaint was also warranted under CPLR 327.

Plaintiff, while employed by Citibank in the 1990s, devised a stratagem that enabled Citibank to make private equity investments in large Brazilian companies that were being privatized. At that time, the Office of the Comptroller of the Currency prohibited Citibank from managing any fund that would invest directly in Brazil. Therefore, plaintiff, acting with Dantas, a Brazilian citizen, created Opportunity Ltd., a Cayman Islands corporation. Opportunity Invest, a British Virgin Islands corporation, was the majority shareholder of Opportunity Ltd. Both entities are alleged to have been controlled and dominated by Dantas. The underlying Brazilian investment

enterprise was carried out under three agreements that involved the Opportunity defendants and were executed on December 30, 1997: a shareholders' agreement, a limited partnership agreement and an operating agreement. Plaintiff, who owns shares of Opportunity Ltd., was a party to the shareholders' agreement but not the limited partnership agreement or the operating agreement.

The majority correctly cites *Licci v Lebanese Can. Bank, SAL* (20 NY3d 327, 334 [2012]) for the proposition that the issue of jurisdiction under CPLR 302(a)(1) requires a determination of (1) whether the Opportunity defendants transacted business in New York and, if so, (2) whether plaintiff's causes of action arise from such transaction. The majority speaks of "a broader transaction of business in New York from which plaintiff's causes of action arise." Although the shareholders' agreement is related to other contracts with Citibank, the complaint makes it clear that plaintiff's causes of action arise out of the shareholders' agreement only. The following excerpt from the declaratory judgment cause of action, which mirrors the contract cause of action, is illustrative:

> "116. Specifically, Plaintiff asks this Court to declare the following:
>
> "a. Plaintiff and the Opportunity Defendants entered into the Shareholder Agreement, and this Agreement created a quasi-partnership relationship among them;
> b. The quasi-partnership created fiduciary duties owed

> to Plaintiff by the Opportunity Defendants, including but not limited to fair dealing, utmost good faith, loyalty, candor, and just and equitable treatment;
> c. These fiduciary duties include the duty to disclose material information to Plaintiff, including but not limited to the terms being negotiated, and agreed upon, in the Settlement Agreement;[1]
> d. These fiduciary duties, and the duty of just and equitable conduct, include the duty to make adequate disclosures, which duty was violated when the Opportunity Defendants negotiated a Settlement Agreement that barred Plaintiff from access to its terms, when the Opportunity Defendants secured distributions of the disinvestment profits solely to themselves and to the exclusion of Plaintiff, and when thereafter they refused to honor the obligation to pay Plaintiff the reasonable value of his interest in those profits, and when they failed to honor his demand to exercise his put option."

With respect to contracts, "[u]nder New York law, the transacts-business standard can be satisfied where both the negotiations and execution of a contract took place within New York" (*Grand Riv. Enters. Six Nations, Ltd. v Pryor*, 425 F3d 158, 166-167 [2d Cir 2005], citing *George Reiner & Co. v Schwartz*, 41 NY2d 648, 652-653 [1977]). In his opening brief, plaintiff cites an exhibit to the complaint in which it is stated that "the Shareholder Agreement was simultaneously executed in New York" by the Opportunity defendants and plaintiffs. The mere execution of agreements in New York, however, does not constitute the

[1]The settlement agreement ended litigation among Citibank, Opportunity Ltd. and Dantas. Plaintiff was not a party to that lawsuit.

transaction of business under CPLR 302(a)(1) (*see Standard Wine & Liq. Co. v Bombay Spirits Co.*, 20 NY2d 13, 17 [1967]; *Abbate v Abbate*, 82 AD2d 368, 384 [2d Dept 1981).

The complaint itself provides no basis for the majority's apparent inference that the agreement was negotiated here. Although paragraph 32 mentions negotiations between plaintiff and Dantas, it is not stated where the negotiations took place. Words with the root "negotiat" appear in the complaint 34 other times. Not one of these words, however, is used in reference to the shareholders' agreement or the other two agreements plaintiff invokes. It is also undisputed that plaintiff and Dantas both resided in Brazil during the four months preceding the execution of the agreements plaintiff invokes. In light of this fact, there is no reason to infer, as the majority does, that the agreements were negotiated in New York as opposed to Brazil. This is not a matter of what the majority describes as an inartfully drafted pleading. Rather, the complaint is simply devoid of jurisdictional facts that could have been alleged had they existed. The lack of discovery cited by the majority is of no moment. Plaintiff could have requested jurisdictional discovery pursuant to CPLR 3211(d), but did not do so. I therefore assume that it was unnecessary.

The majority also posits that even if the shareholders' agreement had not been negotiated in New York, plaintiff's cause of action would arise from an "integrated whole" that includes the limited partnership agreement and the operating agreement. This broad transaction theory is at odds with the Second Circuit's determination that plaintiff's right to seek compensation stemmed solely from the shareholders' agreement and an alleged oral agreement with Dantas (*Wilson v Dantas*, 746 F3d 530, 537 [2d Cir 2014]. During colloquy before the district court, plaintiff's counsel conceded that his causes of action were based on nothing more than a put option set forth in the shareholders' agreement.

Grounds for dismissal of the complaint under the doctrine of forum non conveniens are even more compelling. Codified in CPLR 327(a), the forum non conveniens doctrine permits a court to stay or dismiss an action where it is determined that the action would be better adjudicated in another forum (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). Brazil, the place of residence of plaintiff and Dantas, where the underlying transactions took place, offers such a forum (*see e.g. Patriot Exploration, LLC v Thompson & Knight LLP*, 16 NY3d 762 [2011]). As stated above, Opportunity Ltd. and Opportunity Invest are foreign entities. Therefore, no party to

this action is a New York resident or entity. Moreover, the resolution of this case will require the application of Cayman Islands law, as required by the shareholders' agreement. In reliance on section 94(d) of the Caymans Companies Law, a Cayman Islands statute, the complaint's declaratory judgment cause of action calls for relief "[i]n accordance with the procedure followed by the courts of the Cayman Islands, and the Privy Council."[2] The complaint here provides much more than "[b]road allegations that issues of [Cayman Islands] law will arise ... " (*compare Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 74 [1984] [cited by the majority]). "The applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of dismissal" (*Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436, 438 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013] [internal quotation marks omitted]). The majority erroneously adopts plaintiff's argument that litigation in Brazil or the Cayman Islands would cause hardship because there is no right to trial by jury in either of those jurisdictions. Although the majority is not reinstating the declaratory judgment cause of action, the complaint

[2]The English Privy Council functions as the Cayman Islands' highest appellate court (*Intl. Equity Invs., Inc. v Opportunity Equity Partners, Ltd.*, 407 F Supp 2d 483, 498 [SD NY 2005], *affd* 246 Fed Appx 73 [2d Cir 2007]).

undermines plaintiff's hardship argument by calling for a determination in accordance with the procedural law of the Cayman Islands. *Neville v Anglo Am. Mgt. Corp.* (191 AD2d 240 [1st Dept 1993]) and *Gyenes v Zionist Org. of Am.* (169 AD2d 451 [1st Dept 1991], which the majority cites, are distinguishable. Unlike the New York residents who brought those wrongful death and personal injury actions, plaintiff negotiated and executed an agreement that provided for the adjudication of his disputes "in accordance with the laws of the Cayman Islands." Contractual choice of law provisions are enforceable (*see Union Bancaire Privee v Nasser*, 300 AD2d 49, 50 [1st Dept 2002]). The third, fifth and ninth causes of action were correctly dismissed for reasons stated by the majority.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 14, 2015

CLERK